

**FY 2006 FAIR ACT AND INHERENTLY GOVERNMENTAL INVENTORIES  
JUSTIFICATION GUIDANCE****INHERENTLY GOVERNMENTAL**

OMB is requiring Agencies to submit justifications for all FTE designated as inherently governmental with the FY06 Inventories. The following guidelines have been prepared for Administrations to use for completion of their FAIR Act and Inherently Governmental Inventories justifications.

OMB states that an inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. However, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance...<sup>1</sup>

Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.

**Justification Criteria:**

When designating an FTE as inherently governmental it must be accompanied by a justification that can support the decision. Specifically the activities must be inherently governmental and the FTE must have the authority to perform such activities. Inherently governmental activities must adhere to the following criteria:

- 1) Inherently governmental justifications must include one or more activities that involve:
  - Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
  - Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
  - Significantly affecting the life, liberty, or property of private persons; or

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<sup>1</sup> OMB Circular A-76 (revised) May 2003

- Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.

(Note: Significantly affecting the life, liberty, or property of private persons is to be used with discretion. If used, the justification must clearly show how it can affect the life, liberty, or property of private persons. This usually means the decision can have an immediate affect and is the final authority. See FY 05 guidance for more information.)

2) The activities must be specific and the authority to perform these activities must be formally established. Acceptable authority includes, but is not limited to the following:

- Warranted contract authority;
- By statute or legislation;
- Prescribed in position descriptions;
- Appointed.

The following are examples of activities and the prescribed authority:

- Binds the government to a course of action by adjudication of contract cases pursuant to the Contract Disputes Act, 41 U.S.C. § 601 et seq., that typically include the conduct of formal or informal hearings that accord appropriate due process;
- Exercises substantial discretion and has signature authority to implement policies which affect the mission of PHMSA program;
- Has signature authority and final authorization to make staffing decisions which include selecting for hire, terminating, and evaluating Federal employees for the FAA;
- Has ultimate control over program and budget priorities, and controls U.S. Treasury accounts.

### **Tips for writing justifications:**

- Limit justifications to include ONLY the inherently governmental activities;
- Use key words such as; substantial discretion, implementing policy, signature authority, exercise ultimate control, makes decisions, binds the government, commits the government, etc.;
- Indicate how a position binds the government;
- If applicable, indicate what types of staffing decisions are made. (Example: making staffing decisions such as whether to hire contractors or Federal

- employees, selection for employment, final authorization for position descriptions, final signature for disciplinary actions or performance reviews);
- Explain what the FTE exercises the ultimate control of (Example: exercising ultimate control over the budget of the office);
  - Include the specific program, office, and or associated representation information;

**Examples of inherently governmental (I) justifications:**

The examples are not all inclusive of inherently governmental activities performed by the DOT. Operating Administrations Competitive Sourcing Coordinators (OACSCs) will have to exercise discretion and meet the criteria based on the activities performed by each Administration's FTE.

Examples:

1. These FTE are responsible for and have signature authority to select individuals for federal employment, formalize performance appraisals, implement disciplinary actions, and authorize position descriptions for the RITA GIS program, the BTS web, and the NTL support platform.
2. These FTE exercise substantial discretion in applying Government authority and in making decisions for the Government. They determine and implement governmental program policy for the FAA and respond to congressional inquiries.
3. These FTE have the authority to implement agency (PHMSA) CR policy, determine CR priorities, determine CR budget requests, and provide direction and control of CR Office staff: which includes determining the hiring of CR staff, the approval of position descriptions and performance standards for CR staff, and they determine the acquisition and disposal of government property.
4. These FTE serve as warranted Contracting Officers for the FAA. They bind the government by awarding contracts and approving any contractual documents; to include documents defining requirements, incentive plans, and evaluation criteria.

(Note: The activities performed by Contracting Officer Representatives (CORs) and Contracting Officer Technical Representatives (COTRs) are not inherently governmental. They are commercial activities and are assigned reason code A with an acceptable justification.)

## COMMERCIAL REASON CODE A

Commercial reason code A justifications will continue to be submitted with the FAIR Act Inventory. OMB has consistently provided guidelines to aid Agencies in determining if an FTE is Commercial, assigning a reason code, and offering examples of how to write a Commercial reason code A justification. Agencies must provide complete justifications for any function that has been newly designated as reason code A on the 2006 inventory. This requirement must be met to receive credit for satisfying the PMA “green” standard on “written justifications for all categories of commercial activities determined to be unsuitable for competition.

The Circular does not specify what constitutes an acceptable reason for categorizing a function as reason code A. The Department of Transportation has issued guidance to assist OACSCs to make that determination and this document serves as guidance to help agencies structure their reason code A justifications so that agencies may achieve incremental improvements with each inventory submission.

### **Justification expectations:**

Justifications should reflect an appropriate and consistent application of criteria. They should contain enough information to enable a reasonable lay person to validate the function and reason code designations.

### **Justification criteria:**

Both OMB and DOT require the following key elements to be in the written justification:

1. A thorough definition of the function performed, including required skills and responsibilities;
2. A detailed explanation of the responsibilities and daily activities of the function, and;
3. A clear explanation of why it is necessary for the commercial function to be categorized as unsuitable for competition.

### **Tips for writing justifications:**

When writing a justification for Commercial reason code A FTE, three questions should be answered. The questions and sample answers that may or may not apply to your FTE have been provided below.

- 1. What activities do these FTE perform that are not appropriate for competition?*

- Maintains senior level oversight and evaluation of core mission activities in the accounting, acquisition, financial, and human resources information technology arena on an ongoing basis.
- Establishes accountability policies and procedures, and provides independent, day-to-day oversight over accountability of Government security documents manufactured .
- Monitors monthly manufacturing performance with respect to established standards, and reporting such findings to management. Provides oversight to the Bureau's Quality Management System and Management Controls programs by conducting Internal Quality audits and Internal Control reviews.
- Performs budget, management, and program analysis work including cost analysis, workload modeling, and manpower and equipment requirements.
- Conducts reorganization and planning activities.
- Analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.
- Develops strategic research plans, prepares policy guidance with nationwide impact, monitor the allocation and application of Federal resources for research projects, and collaborate with State and international customers, partners, and stakeholders in the development and evaluation of advanced/innovative technology.
- Leads development, implementation, and evaluation of new human resources information systems, as well as providing confidential advisory services to the Agency leaders and other senior officials.
- Performs personal security processing for new employees and contractors; implementing and improving a wide-range of employee entry and on duty programs; making determinations regarding compliance with Office of Workers'.
- Assuring compensation program requirements and monitoring budgetary expenditures for Agency-wide human resources programs.
- Providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relation's campaigns, or conducting agency training courses.

2. *What skills are required to perform the function?*

- Specialized knowledge of FHwy operations and analytical skills are required to provide management with the information needed.
- Provide necessary expertise and knowledge of restrictive FAA developed automation systems are essential to ensure resources are in place for modifications of unique, complex and sophisticated automation programs and systems.

- Essential leadership and technical competence to standardize, analyze, engineer, evaluate, and promote technologies and practices for improving traffic flow for FRA.
- Extensive historical knowledge is required to ensure continuity of operations. Activities include: serving as program manager for the Agency's automated staffing program; managing the personnel action and payroll systems; and integrating new Departmental and Office of Personnel Management requirements into established personnel processing and staffing processes.
- Requires a unique ability to move between a variety of civil engineering disciplines to include: project management; highway design; survey; right-of-way; mapping; utilities; materials; geotechnical engineering; pavements; safety; hydraulics; structures; and traffic engineering.

3. *Why are they not suitable for competition?*

- A portion of the commercial work and activities performed within this functional category requires a sufficient number of specialized FTE capable of dealing with and advising and communicating on issues of great public interest.
- Must retain a sufficient number of professionally qualified and experienced FTE as an in-house cadre of suitable candidates for the Agency's inherently governmental management, oversight, and stewardship functions.
- Function routinely requires working with proprietary, sensitive, pre-decisional business information to develop various proposals for consideration by inherently governmental final agency decision makers.
- A sufficient number of FTE are required to provide independent, day-to-day oversight of core FMCSA functions.
- FRA requires a sufficient number of trained and experienced FTE with historical knowledge to ensure continual performance of a core function.
- RITA requires a sufficient number of FTE within this function to provide an in-house cadre of suitable candidates for career growth in mission critical areas of the agency.
- The FTE performing a commercial function are currently filled by individuals with disabilities.
- FTEs currently performing function require distinctly multiple skill sets, so that the agency has the flexibility to rotate FTE between assignments as needed for maximum productivity potential.
- Function is preformed by a student intern as a part of formalized program for federal recruitment.

**Examples of commercial reason code A justifications:**

The examples are not all inclusive. Operating Administrations Competitive Sourcing Coordinators (OACSCs) will have to exercise discretion and meet the criteria based on the activities performed by their Commercial reason code A FTE. The following examples answer three questions: What activities do these FTE perform that are not appropriate for competition; what skills are required to perform the function; why are they not suitable for competition?

1. These FTE develop accountability policies and procedures, and provide independent, day-to-day oversight over accountability of Government security documents manufactured. They provide a level of technical and operational knowledge essential to achievement of the FRA's vision and strategic goals for the Nation. FRA must retain a sufficient number of professionally qualified and experienced FTE as an in-house cadre of suitable candidates for inherently governmental functions, therefore these FTE are not suitable for competition under OMB Circular A-76.
2. These FTE are responsible for leading the development, implementation, and evaluation of new human resources information systems, as well as providing confidential advisory services to the Administration's leaders and other senior officials. They provide necessary expertise and knowledge of restrictive FAA developed automation systems essential to ensure resources are in place for modifications of unique, complex and sophisticated automation programs and systems. The Agency requires a sufficient number of trained and experienced FTE with historical knowledge to ensure continual performance of a core function. These FTE are not appropriate for competition under OMB Circular A-76.
3. These FTE provide the professional engineering expertise needed to serve as front-line representatives for interpreting and applying Federal policies; represent FHWA in public forums and meetings with other agencies; collaborate with State, local and tribal government customers; achieve uniform interpretation and application of Federal laws, regulations, and policies; and evaluate and improve Federal Lands Highway Program delivery processes. In this area, FHWA must retain a sufficient number of trained and experienced FTE as an in-house cadre of suitable candidates for the Agency's inherently governmental management, oversight, and stewardship functions. These FTE are not appropriate for competition under OMB Circular A-76.
4. These FTE serve as Contracting Officer's Technical Representatives for a variety of FHWA contracts. They perform activities that include the approval and/or acceptance of products and services, price analyses, and they verify adherence to the contract terms. FHWA requires a sufficient amount of FTE with FHWA

knowledge to avoid putting the mission at risk. They are not appropriate for competition under OMB Circular A-76.

(Note: Project managers and designated contracting officer representatives (commonly referred to as CORs or COTRs) may be considered core functions. An agency is likely to find that its operations would be at substantial risk if there were no in-house employees to perform these functions. However, these functions should be considered core only to the extent required to avoid substantial risk – i.e., not every FTE in these categories is necessarily core since it would not put an agency’s mission at risk to have a portion of these functions performed by contractors, so long as a sufficient number of FTE remained in house to perform the necessary oversight.)